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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/973,185	10/10/2001	Glenn H. Weissman	58049-017	4487

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EXAMINER	
WARE, DEBORAH K	
ART UNIT	**PAPER NUMBER**
1651	8

DATE MAILED: 04/09/2003

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.	Applicant(s)
09/973,185	Weismann
Examiner	**Art Unit**
Deborah Ware	1651

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136 (a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1) ☒ Responsive to communication(s) filed on *Jan 13, 2003* .

2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.

3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11; 453 O.G. 213.

Disposition of Claims

4) ☒ Claim(s) *1-22* is/are pending in the application.

4a) Of the above, claim(s) *17-22* is/are withdrawn from consideration.

5) ☐ Claim(s) _____ is/are allowed.

6) ☒ Claim(s) *1-16* is/are rejected.

7) ☐ Claim(s) _____ is/are objected to.

8) ☐ Claims _____ are subject to restriction and/or election requirement.

Application Papers

9) ☐ The specification is objected to by the Examiner.

10) ☐ The drawing(s) filed on _____ is/are a) ☐ accepted or b) ☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

11) ☐ The proposed drawing correction filed on _____ is: a) ☐ approved b) ☐ disapproved by the Examiner.

If approved, corrected drawings are required in reply to this Office action.

12) ☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. §§ 119 and 120

13) ☐ Acknowledgement is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a) ☐ All b) ☐ Some* c) ☐ None of:

1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____ .
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

*See the attached detailed Office action for a list of the certified copies not received.

14) ☒ Acknowledgement is made of a claim for domestic priority under 35 U.S.C. § 119(e).

a) ☐ The translation of the foreign language provisional application has been received.

15) ☐ Acknowledgement is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

Attachment(s)

1) ☒ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☒ Information Disclosure Statement(s) (PTO-1449) Paper No(s). 5
4) ☐ Interview Summary (PTO-413) Paper No(s). _____
5) ☐ Notice of Informal Patent Application (PTO-152)
6) ☐ Other:

Claims 1-22 are pending.

1. Applicant's election with traverse of Group I, claims 1-16 (now includes 19-20) in Paper No. 7 is acknowledged. However, claims 19 and 20 are placed with Group I, since claim 19 depends from claim 1 pursuant Preliminary Amendment of January 10, 2002. The traversal is on the ground(s) that no serious burden of search is required. This is not found persuasive because each of the claimed restricted groups are classified in different classes and subclasses. Furthermore a reference which reads on one Group would not necessarily read on the another group because there are more ingredients required of Group III than for Group I. Furthermore, the methods require the administering of different compositions. Further, no effective amount is required of Group III nor is a liposome carrier required therefore.

2. Also the requirement for anti-snoring for the compositions is not necessarily a basis for patentability and different issues of patentability are required for composition type claims than for method type claims. Also two way distinctness exists between the compositions wherein different ingredients are required for Group I wherein, for example linoleic acid is not a required feature for the compositions of Group I nor are the specific concentrations of the homopolyscharide required for Group III, and the specific combination of ingredients for Group III is not required of Group I. Further, the method groups have two way distinctness because different compositions are required to be administered and thus, different process steps are required of the two claimed methods. One way distinctness exists between the methods and compositions in that the compositions may be used in an entirely different method, for example

as a nutrional or dietary supplement. Also note that Group II does not require oat beta glucan since claims 19-20 depend from claim 1.

The requirement is still deemed proper and is therefore made FINAL.

3. Claims 17-22 are withdrawn from further consideration pursuant to 37 CFR 1.142(b), as being drawn to a nonelected invention(s), there being no allowable generic or linking claim. Applicant timely traversed the restriction (election) requirement in Paper No. 7.

The Preliminary Amendment of January 10, 2002, is further acknowledged.

The Information Disclosure Statement of August 16, 2002, is noted and references have been considered as indicated on the enclosed PTO-1449 Form.

4.The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

5. Claims 19-20 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claims 19 and 20 are rejected for failing to set forth proper antecedent basis for "A method according to claim 1" as set forth in claim 19, line 1, since no method is required in claim 1.

6. Claim 2 is objected to under 37 CFR 1.75 as being a substantial duplicate of claim 1. When two claims in an application are duplicates or else are so close in content that they both cover the same thing, despite a slight difference in wording, it is proper after allowing one claim

to object to the other as being a substantial duplicate of the allowed claim. See MPEP § 706.03(k). An aqueous solution as claimed when read in light of the specification does not appear to be significantly different from a solution as set forth in claim 1. All of the examples require water which provides an aqueous solution as set forth in claim 2. It is unclear if Applicants intend for claim 1 to omit water since the all of the examples disclose water to be contained by the composition, which therefore, reads on an aqueous solution.

7. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

> A person shall be entitled to a patent unless -
>
> (b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

8. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

9. Claims 1-3 and 13 are rejected under 35 U.S.C. 102(b) as anticipated by or, in the alternative, under 35 U.S.C. 103(a) as obvious over Andermann (A).

Claims are drawn to a composition for controlling snoring comprising homopolysaccharide in a specific concentration and purified water.

Andermann appear to teach a homopolysaccharide in a specific concentration and purified water. See abstract and col. 3-4, all lines.

The claims are identical to the disclosure of Andermann and are therefore, considered to be anticipated by the teachings therein. However, if for some reason there is a difference then such difference is considered to be so slight as to render the claims prima facie obvious over the cited prior art. One of skill would have been motivated by Andermann to select for a homopolyscharide as claimed herein.

10. Claims 1-16 are rejected under 35 U.S.C. 103(a) as being unpatentable over Andermann in view of Chen (B) and Mitchell et al. (C) and Stillman (D) and WO 00/25588 (PTO-1449 Form) and 0 137, 302 (PTO-1449 Form).

Claims are drawn to composition comprising several ingredients including oat beta glucan, glycerin, vitamins, peppermint oil, licorice root, slippery elm extract, polysorbate 20/80, prickly ash extract, several different essential oils, purified water, pyridoxine HCl and an be used in a spray.

Andermann is discussed above.

Chen teaches slippery elm, licorice and prickly ash extracts, note col. 9-10, all lines.

Mitchell teaches vitamins and essential oils such as almond oil, olive oil, sunflower oil, peppermint oil, ect. Note the abstract. Also pyridoxine HCl is disclosed, see Table 1.

Stillman teaches oat(beta glucan) polysaccharide, note col. 3, lines 46-47.

WO 00/25588 teaches spray and throat formulations for these types of compositions, see page 5, all lines.

0 137, 302 teaches polysorbate 80 and glycerin, see page 4, all lines.

Claims 4-12 and 14-16 differ from Andermann in that all of the additional ingredients including oat(beta glucans) are not disclosed.

It would have been obvious at the time the claimed invention was filed to combine all of the teachings of the above cited references to provide an anti-snoring composition. All of the ingredients are taught to be well known in the art. To combine well known ingredients is obvious over the cited prior art. One would have been motivated to combine these ingredients to provide for an anit-snoring composition. The claims are prima facie obvious.

11. All claims fail to be patentably distinguishable over the state of the art discussed above and cited on the enclosed PTO-892 and/or PTO-1449. Therefore, the claims are properly rejected.

The remaining references listed on the enclosed PTO-892 and/or PTO-1449 are cited to further show the state of the art.

No claims are allowed.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Deborah K. Ware whose telephone number is (703) 308-4245. The examiner can normally be reached on Mondays to Fridays from 9:30AM to 6:00PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Mike Wityshyn, can be reached on (703) 308-4743. The fax phone number for the organization where this application or proceeding is assigned is (703) 305-3592.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-0196.

DEBORAH K. WARE
PATENT EXAMINER

Deborah K. Ware

Art Unit 1651

April 5, 2003